

State of Hawaii
DEPARTMENT OF LAND AND NATURAL RESOURCES
Division of Forestry and Wildlife
Honolulu, Hawaii 96813

December 8, 2006

Chairperson and Members
Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

Land Board Members:

**SUBJECT: ADOPTION OF AMENDMENTS TO HAWAII ADMINISTRATIVE
RULES CHAPTER 13-209 (RULES REGULATING ACTIVITIES
WITHIN NATURAL AREA RESERVES)**

This submittal requests the Board to adopt proposed amendments to Hawaii Administrative Rules (HAR) Chapter 13-209 (Rules Regulating Activities within Natural Area Reserves).

Background: HAR Chapter 13-209 was adopted in 1981 pursuant to HRS § 195-5, which authorized the department, with the approval of the NARS Commission, to make rules governing the use, control and protection of areas including within the natural area reserves system. Since that time, the rules have been amended only once, as part of a department-wide initiative to specifically prohibit commercial activity without a permit.

Over the years, there have been occasions where shortcomings in the existing administrative rules have resulted in a failure to efficiently or effectively respond to threats to the natural areas reserves. The need to comprehensively review Chapter 13-209 and propose amendments to strengthen the department's ability to protect the unique natural and cultural features of the NARS system has been recommended for some time by both staff and NARS Commissioners. During a planning workshop in late September 2005, staff and Commissioners identified priority rule changes necessary to ensure preservation of the unique natural resources. Based on those discussions and further input from NARS staff and from the Rules and Policy Subcommittee of the NARS Commission, the proposed draft amendments were developed. On December 12, 2005, the NARS Commission approved proceeding to public hearing.

On January 13, 2005, the Board of Land and Natural Resource authorized the Division of Forestry and Wildlife to hold public hearings on the proposed amendments to HAR Chapter 13-209. Subsequently, the Division obtained or conducted the following:

- approval to conduct public hearings by the Department of the Attorney General – February 27, 2005;
- review of the proposed rule changes and subsequent support of the Small Business Regulatory Review Board, attached to the Department of Business, Economic Development, and Tourism, to proceed to public hearing – April 19, 2006;
- approval to conduct public hearings by the Governor – May 2, 2006;
- published notice of public hearings in the Garden Island, the Honolulu Star Bulletin, the Maui News, West Hawaii Today, and the Hawaii Tribune Herald – May 28, 2006;
- public hearings conducted in Lihue (Kauai), Honolulu (Oahu), Waikapu (Maui), and Hilo (Hawaii) – June 28, 2006.

Summary of public hearings: Approximately 11 people attended the public hearing on the island of Hawaii; three provided oral testimony. Approximately 45 people attended the public hearing on Maui; 17 provided oral testimony. Approximately 100 people attended the public hearing on Oahu, eight provided oral testimony. Approximately 45 people attended the public hearing on Kauai; nine provided oral testimony. Nearly 30 people also provided testimony in writing. A summary of the public testimony received is included as Attachment 1. The major issues raised during the public hearing period were opposition to restrictions on the possession of fishing equipment in NARS besides Ahihi-Kinau, and concern about the impact of permits and application fees on educational groups and research.

Tape recordings of the four public hearings and copies of all written testimony received are being made part of the administrative file at the Division and are available for public review upon request.

Discussion of testimony and Division analysis: Much of the testimony received was in support of the proposed amendments. However, given the scope of the proposed amendments, there were many specific issues raised during public hearing. In consultation with the Attorney General's office and the Rules Subcommittee of the NARS Commission, the Division reviewed each issue individually and developed a response and recommendation for each issue (Attachment 2). For most of the issues raised, the recommendation was to make no change to the proposed rule amendment. However, for a few issues raised during public hearing, the Division recommended making changes to the proposed amendments as follows:

Comment: Regarding 13-209-4(2), we support the proposal to allow service animals in a NAR and recommend amending language to replace the word 'masters' with the word 'handlers.'

Response: Staff agrees.

Recommendation: Amend the language as follows:

"(2) To introduce any form of plant or animal life, except dogs when permitted by hunting rules of the department and service animals accompanying their handlers;"

Comment: The language of HAR 13-209-4(14) would restrict fishing in NARS where fishing is legal, by prohibiting possession of fishing equipment. We oppose any language in the rules that would result in restrictions on fishing or access for fishing.

Response: The intent of this proposal was to provide another enforcement tool to address poaching in Ahihi-Kinau NAR. However, the language, as initially proposed, goes further and would have the effect of preventing currently legal fishing activities, activities that occur from the reserve but involve the marine waters adjacent to and outside the boundaries of the reserve. While it could be argued that marine areas offshore of NARS should be 'no-take' areas, such a determination should involve collaboration with DAR and additional public involvement, rather than being done in a "back-door" manner. Due to the volume of public comment received on this issue prior to the public hearing, the proposed alternative language was developed prior to the public hearing and provided to attendees for their review and comment. Testimony was received in support of the recommended language below.

Recommendation: Modify the language as follows:

"(14) To have or possess the following tools, equipment, or implements: fishing gear or devices within Ahihi-Kinau natural area reserve, including but not limited to any hook-and-line, rod, reel, spear, trap, net, crowbar, or other device that may be used for the taking, injuring, or killing of marine life; cutting or harvesting tools or gear, including but not limited to chainsaws, axes, loppers, any mechanized or manual sawtooth tool, seed pickers, or machete, that may be used for the taking, injuring, or killing of plant life; and hunting gear or tools that may be used for the taking, injuring, or killing of wildlife, except as permitted by the hunting rules of the department."

Comment: The prohibition on anchoring (13-209-17) violates maritime law, which requires provision for boats in distress. The prohibition on anchoring (13-209-17) should be specifically limited to Ahihi-Kinau NAR since it is the only NAR with marine waters.

Response: The division disagrees that the prohibition on anchoring violates maritime law as the State has the power to regulate boating activities and commonly establishes areas where mooring and anchoring is limited or restricted.

Since Ahihi-Kinau is the only NAR with marine waters, to minimize public confusion, staff agrees that the prohibition on anchoring in marine waters should be limited to Ahihi-Kinau.

Recommendation: Modify the language in 13-209-4(17) to the following:

"(17) To anchor or moor any vessel on or in the marine waters of Ahihi-Kinau;"

Comment: 13-209-5(b) provides that no permit may be valid for more than one year. There may be instances where having a long-term permit is appropriate. Examples would be permits issued to other governmental agencies pursuant to a Memorandum of Agreement that outlines a cooperative relationship between the State and the other agency (such as the Tropical Experimental Forest).

Response: Staff agrees.

Recommendation: Modify the language of 13-209-5(b) as follows:

"No permit may be valid for more than one year from date of issuance. The board may waive this restriction for permits issued to other governmental agencies where the board determines such a waiver to be in the best interest of the State."

In addition, modify the language of 13-209-5.5 (a)(3) as follows:

“The period of time for which the permit is requested, not to exceed one year unless seeking a waiver pursuant to section 13-209-5(b).”

Comment: 13-209-5(c) provides standard conditions on all permits: (3) states that hiking clothing and equipment shall be free of seeds or dirt. ‘Hiking’ should be removed, so this applies to all clothing (not just hiking clothes). ‘Vehicles’ should be added as an item to be free of seeds or dirt. (c) also refers to ‘project’ rather than ‘permit.’

Response: Staff believes these are valid technical suggestions.

Recommendation: Modify the language of 13-209-5(c) as follows:

“(c) All special-use permits shall be subject to standard conditions, as approved by the board, including but not limited to the following:

- (1) The permittee shall adhere to specifications given in the permit application;
- (2) Disturbance of vegetation and wildlife shall be avoided as much as possible;
- (3) Precautions shall be taken to prevent introductions of plants or animals not naturally present in the area. The permittee is responsible for making sure that participants’ clothes, equipment, and vehicles are free of seeds or dirt to lessen the chance of introducing any non-native plants or soil animals. Should an infestation develop attributable to permittee, the permittee is responsible for eradication by methods specified by the department;
- (4) This permit is not transferable;
- (5) This permit does not exempt the permittee from complying with any other applicable rule or statute;
- (6) The State of Hawaii shall be released and held harmless from any and all liability for injuries or death, or damage or loss of property however occurring during any activity related to this permit.”

Comment: Application fee - The application fee of \$50 is too high for researchers or educators; the application fee is too low for commercial activities; the application fee for commercial activities should be a percentage of their estimated income. Specifying an application fee in the rules reduces flexibility to increase or decrease it in the future; instead, the rules should state that an application fee “established by the Department” will be charged to allow more flexibility over time.

Response: Staff agrees that specifying an application fee in the rules would reduce flexibility and limit changing the fee over time to reflect actual costs. However, the division has been advised that providing in the rule that the application fee shall be ‘established by the Department’ constitutes ad-hoc rulemaking and is not permissible. Staff also agrees that it may be appropriate in some cases to reduce or waive the application fee. The application fee is not proposed for revenue generation, but to defray the real costs involved in reviewing permit applications. At the same time, staff believes that there are instances where a waiver of the application fee may be appropriate, such as for activities that do not currently require a permit, but would under the proposed rules (e.g., educational hikes by school groups larger than ten) or for Native Hawaiian traditional and cultural practices. The proposed modification was developed in consultation with the Attorney General’s office and is consistent with fee waiver language utilized by other Departments in their administrative rules.

Recommendation: Modify the language of 13-209-5.5(a)(10) as follows:

“(10) An application fee of \$50, however, the board or its authorized representative may waive the application fee if, in their opinion, the waiver is in the public interest or benefits the State; and ”

Comment: Automatic approval of permits is not appropriate.

Response: HRS § 91-13.5 (enacted in 1998) provides that agencies shall adopt rules that specify a maximum time period to grant or deny a business or development related permit, license or approval. An “application for a business or development related permit, license or approval” is defined as any state or county application, petition, permit, license, certificate, or any other form of a request for approval required by law to be obtained prior to the formation, operation, or expansion of a commercial or industrial enterprise. A special use permit issued by the Board, with the approval of the Commission, is required prior to conducting a commercial use in a NAR. Thus, the automatic approval provision is included in the proposed rules to meet the requirements of HRS § 91-13.5. However, because some permit applications could require additional review and discussion and the NARS Commission does not meet frequently, staff recommends modifying the section to extend the time period to 270 days before automatic approval would occur.

Recommendation: Modify the language of 13-209-5.5(e) as follows:

“(e) If within two hundred seventy days after the department’s acceptance of a completed application, the board or its authorized representative shall fail to render a decision thereon, the application for a special-use permit shall be automatically approved with the standard conditions outlined in section 13-209-5(c), provided that the board may revoke this approval pursuant to section 13-209-5(g) and (h). The two-hundred-seventy-day time period provided shall not commence until a completed application is accepted by the department. Physical receipt of an application by the department does not constitute acceptance. The two-hundred-seventy-day time period for decision may be extended for another one hundred eighty days at the request of the applicant to give the board additional time to review and make a decision on the application.”

In addition to the above, the Division made some minor technical changes fixing typographical errors or clarifying language. The Division has been advised by the Attorney General’s office that modifying the rules as outlined above will not require a second public hearing.

Attachment 3 consists of a copy of the administrative rules proposed for adoption by the Board in Ramseyer format; Attachment 4 consists of a copy of the administrative rules proposed for adoption by the Board in standard format. On November 20, 2006, the Natural Area Reserves Commission unanimously approved the proposed rule changes and recommended their submission to the Board for approval and adoption.

Recommendation:


That the Board of Land and Natural Resources:

- 1) accept the public hearing summary and concur with the Division’s analysis of the public

testimony;

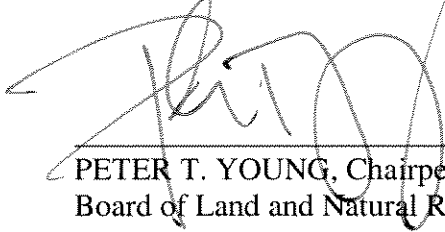
- 2) adopt the proposed amendments to HAR Chapter 13-209 as provided in Attachments 3 and 4; and
- 3) direct staff to forward the amended rule to the Office of the Attorney General for approval as to form, to the Governor for approval, and then to the Office of the Lieutenant Governor for filing.

Respectfully submitted,



PAUL J. CONRY, Administrator
Division of Forestry and Wildlife

APPROVED FOR SUBMITTAL:



PETER T. YOUNG, Chairperson
Board of Land and Natural Resources

Attachments

SUMMARY OF PUBLIC TESTIMONY PROPOSED CHANGES TO HAR § 13-209

Hawaii Public Hearing: June 28, 2006

Deborah Ward: I don't see any provision in rules for cultural practices that may be currently practiced, and we need to be aware that some special areas are not simply NARS, but also culturally significant spots. There needs to be a provision for consultation with Native Hawaiian practitioners, without needing to apply for a \$50 permit. I understand the role of excluding people from caves and how they can unintentional destroy caves and cave biology. But I have had special moments in caves, thinking of how life was 100 years ago. I would hate to think that others would be completely excluded. The cost of the permit application; there should be a fee tier for applications. Commercial fees, since money is derived for commercial use, could be higher than an educational fee. A class visiting might be larger than 8-10 people, but a \$50 application fee may prevent their use, scholarship, and exploration of a site that is truly educational. I would ask that the fee be discretionary. There should be some type of provision allowing flexibility for bona fide educators who might not know the exact date when have to fill out application. I am also concerned with the 180 day automatic approval; automatic approval is a poor idea.

Dick Hoeflinger: I understand the idea is to remove bedroll camping without a permit. This needs to be clarified, because the rule heading is 'Permitted activities': does this section list those permitted, or those requiring a permit? If you read 13-209-3, that leads to confusion.

Unidentified Resident: What are the marine boundaries of Kipahoehoe, Manuka?

Mike Sakamoto: The amendments refer to 'authorized representative' - who is that?

Maui Public Hearing: June 28, 2006

Darrel Tanaka: I support the proposed rule changes. I think it's about time the State does something to protect our environment.

Jonathan Hultquist: I lived on Maui for 15 years and I'm really happy that we're having this meeting and that the NARS system is doing this housekeeping that it has needed for so long and that we have the opportunity to help enforce the rules that we already have and help protect our beautiful natural area.

Scott Jepson: I just came to support the rule changes. I think it's well overdue.

Charles Mannix: I strongly support giving the local rangers the ability and the power to enforce good sensible conservation rules when they have the opportunity to. The only think I would like to add is that every four or six months have a reviewed public meeting

where anyone who would like to raise issues with the way something is enforced could have the opportunity to comment and have a civilized rebuttal. The rangers are doing a great job.

Robin Newbold: I strongly support the proposed rule changes. The reserve was set up not as a park as many of us enjoy using it but it was set up as a natural area reserve to protect marine species and other treasures down there. I'm happy to see that the rules are being changed so that the rangers have the power to carry out the original purpose of the reserve.

Dan Capellan: I fully support the decision that NARS is making to move forward with the rule changes and am happy that this is taking place.

Larry Sarnier: I support these changes, especially for the Board to have the flexibility to enforce the proposed rule changes.

Judy Edwards: I have lived in Hawaii for 11 years and have worked in or around Ahihi-Kinau and La Perouse Bay for the past 5 years as a researcher and an educator and have seen a great deal of damage and desecration during that time. I'm therefore pleased to be here to voice my support for the proposed rule changes that would further enable the State and its agents, the rangers and DOCARE officers, to continue the critical, challenging and timely efforts to uphold and protect the cultural and biological integrity of this NAR.

Cheryl King: The best thing that could ever happen is to have the rangers down there. They're doing a great job, and we've seen improvements since they've been there. Whatever we can do to help them out and have them have an easier job and make things happen down there is a good thing.

Pat Borge: We've waited a long time for this. I support it definitely. We've been fighting for this area for a long time. Everybody deserves credit for this. The fishermen at La Perouse taking care of the area...I also like to stress that there's someone else to give credit to: Val Monson of the Maui News, bringing attention to this area.

Ann Fielding: I've been involved with Ahihi-Kinau NAR since 1978, in fact even before that, I did research there with Bishop Museum. It's been a special place to me for many years. I am impressed with the progress being made. I'd like to thank Pat Borge for his efforts there too, encouraging action. I support these rule changes.

Hannah Bernard: We are very supportive of the rule changes and the ability to the NARS to do things proactively and to make a difference down there. Also I'm very supportive of making sure that the panel that reviews this special management area permit can operate as expeditiously as possible so that it is not a 2 – 6 month delay for things to get down there for educational purposes. I'd like to commend Matt Ramsey for moving things forward, and the support of the rangers for getting things done.

Marie LaBoeuf: We fully support the proposed rule changes.

Flo Bahr: I'm down there often snorkeling or working at the education table. I would just like to mention that Matt and Joe do an awesome job to educate and enforce in a non-confrontational way. They are like ambassadors for our area and these changes will help to support their job, doing it even better than they do now.

Stephanie Kowalsky: I work at Maui Community College, and many of our instructors do take students down to the Ahihi-Kinau area. I strongly suggest that you do not impede them from going there because honestly, it is a very unique site and is very important for our education.

Donna Brown: I'm the coordinator for ____ (undecipherable) program. Like Stephanie said, it is a really important place for education and I am really glad, I would like to support these rules and there will be more ability for the rangers to do their jobs.

Unidentified Waikapu resident: I'm here to support the rule changes. I've been going down to Ahihi-Kinau since I was a kid; I've seen a lot of changes over the years. It is sad to see the opala everywhere, in the ocean, from makai to mauka. I came here too to talk about the archaeological stuff; the marine environment is very important, but as a Hawaiian, it's also important to look at the aina as well, and the symbiotic relationships because the aina and the ocean are the same. If we respect the ocean, we need to respect the land too. It is important not to forget that archaeological sites are there and should be respected as well just as much as the ocean. Mahalo again to the rangers who are doing a fine job out there.

Oahu Public Hearing: June 28, 2006

Neil Kanemoto: The question is on the process. During the Cayetano administration, there was the power to create rules administratively but you have to follow a process (discussion, rules, BLNR approves, AG approves, Governor approves, then public hearing) - we need assurance from DLNR that the previous 5 steps took place. If so, these rules are so drastic and how was the large scope of the ban on fishing implements missed? So you need to understand fishermen are wary of DLNR's agenda. There are 19 NARS - why are there only 4 public hearings? Manuka is on the westside of Hawaii, but the hearing is in Hilo. Lanai and Molokai have no hearing scheduled. Why? For closures, we need to understand the process. There needs to be public process and scientific justification; otherwise it's just closed "because." Also I have issues with visiting hours and the provision prohibiting anchoring – this violates maritime law which requires provision for boats in distress. Finally, prohibiting possession of fishing implements - if just for one NAR in Maui – I have heard they have problems enforcing against poachers, but didn't we just give more money to DOCARE? If so, don't need new regulations.

Keith Sienkiewicz: read written testimony (see summary of written testimony below).

Brian Kimata: First, I take exception to the fact that there are 2 NARS on Molokai and there are no scheduled hearings there. I do support the amended language, which would ensure continued right to fish at Kaena Point. Understand we don't trust DLNR assurances of putting that in. The case in point is Pupukea, where Peter Young said he made a mistake there and he was going to rectify it, and that was 2 years ago, and I still can't fish there - no one can. So taking your word for it - you understand if I'm leery of someone from the Department saying the language will be inserted. The other problem is section 13-209-4.5 closing of areas - my question is who is the authorized representative - how selected, what authority? Is it Peter Young? Could it be the West Hawaii Fisheries Council, which is clearly anti-fishing. Same question for visiting hours. But I do support verbiage limiting the prohibition on fishing implements to Ahihi-Kinau NAR.

Thomas Franco: I'm a private fisherman and hunter. I briefly would like to comment - the proposal you folks have about Ahihi-Kinau on Maui, is just a start, and that it leads back again to the trust of DLNR. Most do not trust DLNR because of past things. This may just be a beginning with Kaena Point; and if we let this go through with Maui, it goes to Kaena Point and we have no control over it. I'm also an avid hunter, I used to be a Wildlife Assistant Manager with DLNR and saw something similar happen with Pahole NAR, above Peacock Flats. You used to be able to hunt there with dogs, now we need a special permit to hunt there - which has really declined interest. On numerous occasions, I saw illegal activity happening there every week. I confronted illegal poachers, but could not cite. I called DOCARE and got excuses. We have more equipment and more manpower than ever before. For 11 years, I put birds up there by the hundreds, and now there are no more birds because enforcement never did their job. At Kaena, people four-wheel and have no respect for the land. We're just fishing on the beach. Nobody comes to our calls. People shoot there at 2 am. We fear as fishermen for our safety. Cars burn, no fire department comes. These concern me, as a taxpayer, fisherman, and hunter. This is just the beginning of more closures and taking away our natural resources. Be honest and fair and don't try to slide something under the carpet.

Tracy Kubota: I'm here tonight because of the proposed rule regarding the ban on fishing gear in a NAR. Although NARS do go to the high tide mark, this would effectively prohibit fishing. Based on the revised language, I support it instead for consideration for future public hearings and urge everyone here who agrees to say something so the proposed rule can be changed. As fishermen, we need to continue to protect our rights as fishermen and be vigilant on anything that makes it make difficult to fish. Back in 1992, when the Department did the Ahihi-Kinau Management plan, there was no scientific evidence on the marine reserve, so it doesn't seem if anything was done to justify the closure of fishing there.

Marjorie Ziegler: I support the concept of rule changes. I have a few concerns: 209-3: hunting should be subject to closure/visiting hours. In 209-4, I am concerned with the language regarding gear - that it is not strong enough. I support a ban on logging equipment in the NARS - for all NARS - and do want a provision allowing volunteers to carry otherwise banned equipment. In the closing of areas, we are okay with that as long as there is a good reason. I would like to see reserves on Kauai being closed; because of

too many tourists, hunters can't use firearms; closing the reserves so hunters can go in and hunt with firearms would reduce animal populations. Regarding permits: I have no problem if Betsy is the authorized representative for a minor permit, but if it is for commercial use or not benign, this should go to the NARS Commission. Where the rules require permit applicants to have clothes free of weeds, add vehicles because they can transmit nasty things too. Instead of 'hiking' clothes, make the rules refer to all clothes because the issue is not limited to hikers. Where it refers to "project activities" or "project specifications" should change the language to 'permit.' In the second to last section, where the BLNR has the authority to revoke a permit, there should be authority to revise permits too. Need more specific information on how the NARS Commission integrates with the Board. In the requirements for special use permit, you need to require the applicants to say how many times they plan to conduct an activity (1x versus frequent). Last, the \$50 application fee is reasonable for small use, but if commercial use, should charge the business a percentage of the income to be derived from commercial use.

Tony Costa: I speak for nearshore fishermen and wanted to go on record mirroring some testimonies, particularly Brian Kibata and Tracy Kubota. I am violently opposed to the initial draft of the rules, but can consider limiting the prohibition on fishing equipment to Ahihi-Kinau. I don't think testifying on language only contained in a press release is not proper. Fishermen don't normally testify before DOFAW, but hope this is conveyed to DAR. The biggest point is all fishermen are very concerned about access. And this is why everyone is here. We are opposed to any new rule that restricts our access.

Ron Morioka: I am a fisherman. I agree with Ms. Ziegler and Mr. Costa. I am not sure that the news release changes addresses the true intent of #14. By limiting to Ahihi-Kinau, this may have harmed valid changes that need to be made. People have not had a true opportunity to understand how these proposed rule changes will affect you. We truly need to see the actual language that will go forward before we can testify appropriately.

Kauai Public Hearing: June 28, 2006

Kawika Kilar: The public hearing was not publicized well enough. The Na Pali is beautiful, the only problem is the hippies. DLNR should have stiffer penalties for repeat offenders.

Quintin Leong: I am a Captain working along the Na Pali coast. Is there really plant life along the coast requiring protection? The biggest problem is squatters. The State already has a hard time protecting what it has, even the accessible parks, so why do you think the State can protect these remote areas? How do we know the NARS won't be expanded in the future and impact us? We want the decision-makers here at the public hearing.

Mel Willis: I am a boat captain. I appreciate the re-writing to limit the prohibition of fishing equipment to A-K only. The proposed rule changes need additional clarifications: 1) #17 (anchoring)- make reference to Ahihi-Kinau there too because of concern of expansion of NAR into the marine waters; 2) #18 (cave entry) - concern that this encompasses sea caves, which are used as part of Na Pali tours; 3) oppose expansion of

NARS; 4) oppose all special use permit requirements - there are too many restrictions. it should be easier for people to enjoy public land.

Keoni Smith: What is the rationale for these rules, particularly #14 - instead, we'd like to see better enforcement of existing rules.

Tiani Kajiwaru: I'm opposed to having new marine NARS without public involvement. You need to research Hawaiian practices.

Andy Kahale: Why is Forestry involved here with the ocean? Why is the State proposing to take away our lifestyle and culture? Why are we shutting down NWHI and commercial fisheries? DLNR never enforces existing rules - we call, and there's no response. Think about the future - protect what we have now. Let us help in management.

Ben Kali Sr.: I am a kahuna on Kauai. I want to protect the rights and cultural resources of Kauai. I object to closures for 2 years - 2 years is a long time. Hawaiians are protected by international law. Kanaka maoli own the land, not you. The State is supposed to bring back the Kingdom of Hawaii, but it is not. This land is ours, and the State cannot stop us from hunting or fishing. The State better make it right; we will never give up. Our natural resources need to be protected for future generations. We don't want to be like Honolulu.

Jonathon Cabone: Regarding NARS, isn't the Na Pali coastline a State Park? What will really help management in this area is to let people get in and hunt the goats, and reduce the animal populations. We don't want more restrictions or loopholes. Kauai is unique, with many endemic species. Local people should be included in management. There should be another public meeting.

Unknown resident: Enforcement is lacking - the rules should not be changed, instead, the Department needs a larger budget and personnel for enforcement.

Summary of Written Testimony

J. Scott Wenham: I support the continued protection of Ahihi-Kinau NAR. I support the proposed rule amendments, particularly trail/area closure to areas called 'Fishbowl' and 'Aquarium' which tourbooks promote without guidance on how to be respectful. I support closure with only guided (permitted or Ranger approved) tours to these areas. I am thankful for the hard work and dedication of Rangers Joe Fell-MacDonald and Matt Ramsey, whose diligence keeps out most poachers and unsafe and illegal boaters. I would not like to see any commercial activities coming back to Ahihi-Kinau nor allowance of commercial vessels in La Perouse Bay (too many close calls with swimmers).

Mike Sakamoto: I support the proposed change to amendments in reference to prohibition on fishing tackle so that it applies only to Ahihi-Kinau NAR. I strongly oppose the wording of 'and authorized representative' because it is too vague and potentially

dangerous to the public - the Board and commissioners are already authorized to make decisions. The marine component of Ahihi-Kinau should be reopened to the public as the scientific justification for closing the NAR has not been provided. I oppose the use of "or its authorized representative;" to me, this could be one person who will have too much decision-making power. Also, it is unclear if an authorized representative could be a group with a personal or private agenda. I support the revisions restricting the ban on fishing equipment to Ahihi-Kinau NAR, as it should be

Francis Howarth: The proposed amendments impose unnecessarily burdensome regulations on researchers who can provide DLNR with expertise and information needed for effective management, specifically a) the \$50 fee is too high for many researchers and educators who are not supported by grant money or have limited funds; b) the time frame for approval of an application should be flexible to accommodate special situations; c) amendments appear to exclude the assistance of volunteers to do some of the resource inventories - these should be encouraged, perhaps through a MOU with recognized groups such as the Cave Conservancy of Hawaii; d) banning all entry into caves will make inventory and monitoring impossible. Section 13-209-4(14) is ambiguous - some implements like knives have dual use (collecting as well as emergency) and there should be an added requirement of probable cause or independent evidence the tools will be used in an illegal manner, and you could add gardening tools and evidence of illegal drug activity. Discouraging educators from using NARS in their classes hinders the ability to instill love of nature and demonstrate the value of NARS

Deborah Ward: I am concerned that rules do not recognize rights of Hawaiian cultural practitioners to participate in activities protected by law; rules should not preclude use of an area for cultural practice. Section 13-209-5.5 is not clear: if a NAR does not have a management plan, how could applicant meet (b)(3); requirement of (b)(4) to show use provides a direct/indirect benefit to NAR is undue burden, and what format is required to meet requirement of (a)(8) of assessment of environmental impacts (EA or less). Requiring a permit (and corresponding application fee) for groups of greater than ten is undue burden on bona fide cultural activities, educators, and legitimate research and management by volunteers, but I support a fee charged to commercial users. Automatic approval of application is not appropriate, and there needs to be a mechanism to make decisions within reasonable (15-45 day) period. Regulations should allow development of a MOU with recognized groups to participate in authorized study, service, and research. I find it sad that actions of a few criminalize sitting in a cave opening shelter (13-209-4(18)). Where will application fee go?

Marjorie Ziegler: In general, I support the proposed amendments. I hope rules will support paradigm shift recognizing introduced game animals are not compatible with native resource protection. Section 13-209-3 should be clarified to indicate hunting is subject to closure and visiting hours. I support limitation of ban on fishing equipment to Ahihi-Kinau. The rules should make clear that staff can carry otherwise banned tools for purpose of protection management. I support the concept of closure and visiting hours. I support authorizing representatives of BLNR and NARSC to issue permits for benign actions, but not for more significant activities (those should have public aspect).

Permittees should be required to make sure participants' clothing is free of seeds and dirt. Grant BLNR authority to revise permit if needed to protect resources or safety; add language on how NARSC could initiate steps to revoke a permit if the Board fails to act. The application should include length and timing of the proposed special use (1x vs. recurrent). The \$50 application fee is too low for commercial tours (which I oppose) – I recommend a percentage of their income. I do not support automatic approval of permits.

Henry Lum: I support the proposed changes only if they are limited to Ahihi-Kinau NAR.

Kurt Kawamoto: I agree with restricting the ban on fishing equipment to Ahihi-Kinau NAR. I do not agree with or support any rules that allow DLNR or its Chairperson any increased freedom to restrict access to other NAR areas. Thank you for scheduling the meeting when working people can come and for opening the meeting to accommodate all who showed up. Locking up natural resources provides no good to the public - resources are owned by the public and should be available for all to use wisely - don't take things away from all because of the actions of a few.

Neil Kanemoto: I am opposed to any language in the proposed rule changes that can lead to any restrictions in fishing and/or related activities - fishing is part of the culture, heritage and lifestyle and we are losing access statewide. I am opposed to any administrative rule change that would give DLNR or any of its divisions or authorized representatives the power to impose any rule changes without a proper public hearing and oversight process.

Fred Stone: I support regulations governing entry and use of NARS and caves within NARS. The proposed rules are burdensome to researchers: a) \$50 fee too high, especially if not supported by grants or institutions; b) long timeframe for review makes it impossible to respond to short-term threats in NARS, c) research based on grants has a time restriction; lengthy process complicates completion of research; d) research often use volunteers and don't know their names 6 months in advance. The regulations should allow development of a MOU to let members of recognized groups to participate in authorized research; e) little research will occur in NARS if all research is required to meet OEQC EA requirements; f) ban of entry into caves would make inventory/monitoring impossible. Educators are impacted by the rules: a) \$50 permit fee too high, b) classes are almost always greater than 10 people, so you can't take an average class into the NAR without a permit, c) insurance requirements, if imposed, would eliminate educational groups, d) requirement of an EA for class visits is unnecessary, e) long timeframe for approval makes scheduling classes difficult. I recommend: a) fees based on user (\$5-\$10 for research or educational use; more for commercial use), b) approval of permits within a reasonable timeframe (1 month), c) group size limited based on type of activity, d) instead of requiring insurance, require release forms, e) work with recognized groups, like National Speleological Society

MiQe Kleme: I am familiar with Ahihi-Kinau NAR. I support the rule changes, but with some dialogue: 1) for closures, it may not be fair to close off one portion and sacrifice another portion (e.g., close Fishbowl and sacrifice Dumps) - Dumps is now becoming

impacted due to redirecting tourists to this previously non-publicized (and previously healthiest) area; 2) on-site presence is the best way to encourage proper visitor behavior; 3) I don't understand the proposed permit process - does it mean single individuals can no longer go anywhere in the reserve without a permit? 4) It is not fair to include just researchers or educators into areas - the general public should be allowed, with education; 5) paths to Ahihi-Kinau snorkel locations are dangerous - kayaks are the safest ways in and out of the reserve; 6) Kealahou Bay and NWHI now allow commercial activities - precedence for Ahihi-Kinau/La Perouse? If the Department considers commercial use, please limit it to a small number brought by trained naturalists and not a Concession to the highest bidder; 7) I give support to the Borges for their genuine persistence and support for this area along with the Rangers.

Brian Funai: In general, while there are legitimate measures proposed, I feel this is just a thinly veiled attempt by the Governor and DLNR Chair to further restrict fishing and access not only of fishermen but also the general public. Specifically, I 1) oppose limits to groups of 10 or more; 2) agree with prohibitions of residences or entering caves; 3) agree with limiting the prohibition on fishing implements to A-K NAR; 4) oppose all other proposed amendments; I do not wish for the DLNR Director to have more authority to further close or restrict access to public lands

Jason Yanase: I request that the Chairperson come to future hearings to address questions and hear testimony himself. I do not agree with the proposed changes, especially at Kaena Point. The ability for Chair or future administrations to close areas without a public hearing, making entry a crime, is unfair in this supposed democracy. Research needs to be done before any closure to ensure it is the only way to cure a problem - reef habitats are being destroyed by run-off in more places than Kaena Point due to vehicular trampling (which is why DLNR wants to close Kaena), but are you closing down development in other areas? No. Fishing is more than just catching fish - it is reflection, family bonding, etc. The majority of fishermen follow the rules, don't penalize all of us for the actions of a few. Instead, beef up enforcement and response so we can assist in stopping the bad guys.

Allan Bayless: Please do not prohibit entry into caves - I find caves fascinating, enjoy looking around them, and see no way that entry in such caves would damage them. Banning all cave entry to address the issue at Ahihi-Kinau of the woman living in a cave is using a sledgehammer to drive in finishing nails. I recommend just prohibiting camping, living or sleeping in caves, rather than a blanket ban on entry.

Cave Conservancy of Hawaii & Hawaii Speleological Survey: Over the past 12 years, members of CCH and HSS have, under DLNR permits, assisted managers in locating, surveying, and conducting inventories in lava caves on DOFAW land, done primarily by volunteers. CCH and HSS recommend DLNR establish policies and procedures to encourage volunteer speleologists to continue to advance cave research in Hawaii. In addition, CCH and HSS recommend DLNR develop MOU with one or more caving organizations that would define how DLNR and these organizations could work together in furtherance of DLNR's mission, advance knowledge of caves, and conserve cave

resources. Finally, we recommend that volunteers working with and for DLNR agencies be exempt from permit application fees and providing comprehensive insurance.

Rodney Izuo: I support banning possession of fishing implements in Ahihi-Kinau ONLY. Since the primary intent is to protect NARS from squatters, I propose rewriting 13-209-4.5 to ensure that access to NARS for fishing continues (even in the event of a closure). I also propose rewriting 13-209-4.6 to ensure access for fishing during hours of time restrictions.

Reid Yoshikawa: I support the proposed change that limits the ban on fishing implements to Ahihi-Kinau ONLY

Donald: Closing Kaena Point is not going to stop problems; instead DLNR officers need to do their job.

Wane Okubo: I am in favor of only Maui's (Ahihi-Kinau) be closed to fishing. I am not in favor of any other area being closed.

Dick Hotema: We believe it is the intent of DLNR to confuse the general public and enact new fishing restrictions. Please provide clarification, at what point does fishing is considered camping and not fishing? Normal equipment used by fishing people includes tents, stoves, sleeping bags, lanterns, etc.

John Wilson: I suggest an alternative philosophy for managing cave volunteers: since Hawaii is the most important locations for lava caves in the world, and much of the documentation of lava caves is being done by volunteer cavers, I propose that DLNR have a component of its volunteer program encouraging responsible cavers to assist in needed work, rather than charging a fee and having a strenuous permit system.

Dick Hoeflinger: I recommend changing the \$50 application fee to "an application fee as established by the Department." Specifying a fee in the rules makes it inflexible to any future change.

Nicole Bartlett: I support revised language regarding fishing in the Ahihi-Kinau NAR; I do NOT support the original draft language as it gives DLNR the authority to restrict fishing in all of the NARS

Rodney Ajifu: I have concerns about your contentions to limit the entry into Kaena Point by the use of permits and the prohibition of killing marine life. I have been fishing at Kaena Point for nearly 15 years with several of my friends and we pose no danger to the natural resources at this location. Our vehicles enter and exit on the dirt road which poses no danger to the plants and wildlife. We only keep the fish that are to be taken home for consumption and return the unwanted caught fish. Finally, the campsite is cleaned up and all trash is taken with us.

Keith Sinkiewicz: After reading the proposed rules, we have come to the conclusion that the fishing community is being forced to surrender its rights and privileges to public lands. The proposed changes are too broad and vague. It appears that once passed, DLNR can do as it pleases unilaterally, without any public input. Recently, DLNR did the same and the fishing community overnight became illegal campers merely by being in possession of a lantern or cot. DLNR should take time to study local fishing customs and accommodate us. We want to see inserted in the rules language that our fishing methods and rights of access to the ocean will be protected. Accessible fishing areas are shrinking; and with the increase in homelessness and drug use, access is critical. The few areas remaining are precious. About 15 years ago, DLNR blocked vehicular access to Kaena on the Mokuleia side without public hearings. Boulders were taken and placed near a special boulder - Leina Kauhane - the leaping off stone, where according to Hawaiians, souls leave this world for the next. This bothers me to this day. DLNR has no respect for the fishing community..

Dr. George Harker; Dr. Leisure's Friends of Makena State Park: I oppose the rule amendments in their entirety. To adopt the rules will destroy the reserve system and open the door to commercial interests wishing to convert State property into condos and other land uses incompatible with the public interest. Limiting group size to less than 10 without a permit could put families or organizations like the Sierra Club in jeopardy and will kill use of the reserves for education. Section 13-209-4(7)(residences) is already covered and need not be added. Section 13-209-4(14)(fish equipment): as written, a fisherman or anyone with a pickup truck would be in violation while merely driving through a NAR to fish or to a job site. Section 13-209-4(16)(presence during closure): it is clear that the Ahihi-Kinau steering committee wants to close Ahihi-Kinau and would put legitimate users in violation. Section 13-209-4(17)(anchor): more serious thought needs to be given to marine NAR management, and the Ahihi-Kinau advisory group represents private inholdings rather than public at large. Section 13-209-4(18)(cave): instead of being concerned with keeping people out of caves, DLNR should find money to restore caves to the condition they were in pre-"preservation." Section 13-209-4(19) (catchall): it seems the active intent of this section is to exclude the public from the NARS.

Liz Foote: I support the proposed rule changes; it will make enforcement of the rules easier and will further protect the natural and cultural resources of the area. I support the work of the rangers and hope the State will continue to fund them. Perhaps the State could implement a user fee system tied in with the special use permits that would support education and enforcement activities specific to the site (including the rangers), much like at Kealahou Bay on the Big Island. While I do support the special use permit system, I am hoping the process is not too long and cumbersome so as to inhibit educational and scientific use of the site.

Victor Ramos: I support every recommended amendment. I believe these measures are necessary to preserve the area for all time.

Maui DOCARE: 1) 13-209-4(7)(camping/residence) should include 'vehicles' along with what's already noted; 2) 13-209-6 (penalty) should be amended to reflect that violation of these rules will be penalized as provided in section 195D-9 not 195-8; 3) add a definition of 'camping'; 4) recommend prohibiting alcohol, drugs, explosives, firearms, traps, etc.; 5) recommend adding a provision for abandoned and unattended property; 6) recommend looking at unencumbered lands rules; 7) may want to formally and legally prohibit 'fish feeding'; 8) recommend a section that prohibits one from sleeping within a vehicle.

Disability and Communication Access Board: We support the proposal to add service animals and recommend the word 'masters' be replaced with 'handlers' to more accurately reflect the assistive working role of service animals for, and the relationship that exists between, people with service animals who use service animals

Petition with 39 signatories: in support of Keith Sinkiewicz's written testimony

Petition with 27 signatories: (Oahu) We do not support any language that would prohibit or limit fishing activities under section 13-209-4 proposed rule #14 other than in Ahihi-Kinau NARS.

Petition with 10 signatories: "We do not support any language within the proposed NARS rule changes that would/could lead to any restriction on fishing or related activities. We are also opposed to any language that would allow for any rule changes without proper public hearings and/or oversight. Thank you."

Petition with 14 signatories: "We do not support any language that would limit or prohibit fishing activities under section 13-209-4 proposed rule 14 other than the Ahihi-Kinau NARS."

**SUMMARY OF ISSUES RAISED DURING PUBLIC TESTIMONY PERIOD
ON PROPOSED AMENDMENTS TO HAR 13-209
AND RECOMMENDED CHANGES**

Major issues raised by members of the public during hearings and the public comment period are outlined below. Each issue is followed by a response on the issue and a recommendation on how to proceed.

13-209-3 Permitted Activities

Issue 1: Requiring a permit for groups larger than ten is an undue burden on educators, cultural groups, and legitimate research and management activities. The limit on group size should be based on the activity type, not on absolute numbers. I oppose limits on group size.

Response: Large groups can have a significant impact on the resources of a reserve, depending upon the size of the group, the number of groups visiting a reserve, the climate/condition when the group is visiting, the area being visited, and the condition of the resources in that area. At the present time, managers have no way to manage group visitation to prevent or minimize harm to the resources. Specifically, they cannot prevent several large groups from visiting at the same time; they cannot limit the frequency of large groups to a sustainable number (e.g., once a week or once a month), and they cannot prevent large groups from entering sensitive areas that are more likely to be damaged if many persons were there at once. The limits simply require a permit – which gives managers a tool to monitor and manage the impacts groups have on a reserve.

Recommendation: No change.

13-209-4 Prohibited Activities

Issue 2: Regarding 13-209-4(2), we support the proposal to allow service animals in a NAR and recommend amending language to replace the word ‘masters’ with the word ‘handlers.’

Response: Staff agrees.

Recommendation: Amend the language as follows:

“(2) To introduce any form of plant or animal life, except dogs when permitted by hunting rules of the department and service animals accompanying their handlers;”

Issue 3: 13-209-4(7) (prohibiting establishment of temporary or permanent residences) is redundant and unnecessary.

Response: While the other rules do provide some tools to address the problem of unauthorized persons residing in a NAR, this proposed rule makes it unquestionable that temporary or permanent residences are not allowed.

Recommendation: No change.

Issue 4: 13-209-4(7) (prohibiting establishment of temporary or permanent residences) should include a prohibition on living within a vehicle within a NAR.

Response: Staff believes the proposed rules would address this issue.

Recommendation: No changes.

Issue 5: The language of HAR 13-209-4(14) would restrict fishing in NARS where fishing is legal, by prohibiting possession of fishing equipment. We oppose any language in the rules that would result in restrictions on fishing or access for fishing.

Response: The intent of this proposal was to provide another enforcement tool to address poaching in Ahihi-Kinau NAR. However, the language, as initially proposed, goes further and would have the effect of preventing currently legal fishing activities, activities that occur from the reserve but involve the marine waters adjacent to and outside the boundaries of the reserve. While it could be argued that marine areas offshore of NARS should be 'no-take' areas, such a determination should involve collaboration with DAR and additional public involvement, rather than being done in a "back-door" manner.

Recommendation: Modify the language as follows:

"(14) To have or possess the following tools, equipment, or implements: fishing gear or devices within Ahihi-Kinau natural area reserve, including but not limited to any hook-and-line, rod, reel, spear, trap, net, crowbar, or other device that may be used for the taking, injuring, or killing of marine life; cutting or harvesting tools or gear, including but not limited to chainsaws, axes, loppers, any mechanized or manual sawtooth tool, seed pickers, or machete, that may be used for the taking, injuring, or killing of plant life; and hunting gear or tools that may be used for the taking, injuring, or killing of wildlife, except as permitted by the hunting rules of the department."

(*note: this alternative language was presented to attendees of the public hearings)

Issue 6: (13-209-4(14)) The prohibition on possession of implements used to take, injure or kill plant life or wildlife, except as permitted by the hunting rules of the department, should be applicable to all reserves, not just Ahihi-Kinau.

Response: Staff agrees; the limitation to Ahihi-Kinau is just for implements used to take marine life.

Recommendation: No change.

Issue 7: (13-209-4(14)) The prohibition on possession of implements used to take, injure or kill plant life or wildlife, except as permitted by the hunting rules of the department, should include a motive aspect, as some items like pocketknives have legitimate uses within the NAR but technically could be subject to citation.

Response: The proposed rule change was suggested to provide DOCARE with an additional tool to prevent harm to natural resources. Instead of having to wait for a suspected illegal logger to actually cut and fell a tree, DOCARE would be able to issue a citation for illegal possession of a chainsaw. Amending the rules to require a motive aspect would reduce the utility of this proposed rule change. Further, while some items that would fall under the scope of this rule do have legitimate uses, most visitors coming to a NAR for hiking or nature study would be unlikely to be carrying these items or have need to be carrying these items. Other users (such as researchers) who might need these items during the course of their research would need to acquire a special use permit

anyway before conducting their proposed use and thus could get permission to possess these items at that time.

Recommendation: No change.

Issue 8: (13-209-4(14)) The prohibition on possession of implements used to take, injure or kill plant life or wildlife, except as permitted by the hunting rules of the department, should include reference to gardening tools.

Response: 13-209-4(14) notes that the items prohibited “includes but is not limited to” the specified list. The list is not meant to be exhaustive, but is intended to illustrate some of the most problematic tools. Staff do not believe it is necessary to add “gardening tools” to the list.

Recommendation: No change.

Issue 9: (13-209-4(14)) Anyone with a pickup truck working construction would be in violation of the prohibition on possession of implements used to take, injure or kill plant life or wildlife, except as permitted by the hunting rules of the department.

Response: This issue is not considered a significant concern, as most NARS are in remote areas, and few people potentially drive through on their way to work. Second, many of the roads transiting a NAR are not technically part of the NAR (such as the road through Ahihi-Kinau, Highway 11 through Kipahoe or Manuka, and the four-wheel drive roads to the ocean at Manuka), further reducing the number of those potentially affected.

Recommendation: No change.

Issue 10: The prohibition on anchoring (13-209-17) violates maritime law, which requires provision for boats in distress. The prohibition on anchoring (13-209-17) should be specifically limited to Ahihi-Kinau NAR since it is the only NAR with marine waters.

Response: The division disagrees that the prohibition on anchoring violates maritime law as the State has the power to regulate boating activities and commonly establishes areas where mooring and anchoring is limited or restricted.

Since Ahihi-Kinau is the only NAR with marine waters, to minimize public confusion, staff agrees that the prohibition on anchoring in marine waters should be limited to Ahihi-Kinau.

Recommendation: Modify the language in 13-209-4(17) to the following, for consistency with § 13-222-32.

“(17) To anchor or moor any vessel on or in the marine waters of Ahihi-Kinau except as provided by the boating rules of the department.”

Issue 11: The prohibition on entry into caves (13-209-18) is burdensome to volunteer cavers who provide a service to the Department. It will make inventory and monitoring of these features impossible. It unnecessarily restricts meditation or peaceful enjoyment of cave features. The Department should enter into MOUs with organizations like the Cave Conservancy of Hawaii or the Hawaii Speleological Society to participate in study, service, or research. I support limits on entry into caves. I oppose limits on entry into caves – entry does not cause harm. Instead of being concerned with keeping people out of caves, the Department should restore caves that it has harmed by its own actions.

Response: Current State law (HRS Chapter 6D) already requires anyone entering or traversing a cave to have the prior written permission of the landowner (HRS § 6D-7). Because of the sensitive nature of cave ecosystems and the purpose of NARS system to protect unique biological and geological for future generations, staff believes that it is reasonable and appropriate for the State (as landowner) to consult with the Natural Area Reserve Commission through the special use permit process before providing consent to enter or traverse a cave within a NAR to ensure that these resources receive the highest protection. Further, retaining the permit requirement ensures that NARS staff are aware of ongoing research and could prevent conflicts (such as a volunteer caver exploring a cave in a NAR during an aerial herbicide control action). The proposed rule changes will not make inventory and monitoring impossible; instead, it will simply require that inventory and monitoring be done after receiving a permit, which will ensure that research efforts are coordinated with NARS staff on each island. Finally, the Department currently has the authority to enter into MOUs, including those with non-profit organizations, to accomplish the goals of the Department, including research and protection of sensitive natural features. Staff believes that developing an MOU with non-profit organizations like the Cave Conservancy of Hawaii would improve communication and formalize relationships between the State and volunteer cave researchers and is worth pursuing, whether or not the proposed rule changes are adopted.

Recommendation: No change.

Issue 12: The prohibition on entry into caves (13-209-18) could unintentionally restrict currently legal tour boat activities along the Na Pali coast (due to entry into sea caves).

Response: Current State law (HRS Chapter 6D) defines a cave as “any naturally occurring void, cavity, recess, or system of interconnected passages large enough for human entry, occurring beneath the surface of the earth or within a cliff or ledge, including the cave resources therein, whether or not an entrance exists or is natural or artificial, and that is of archeological, geological, biological, or cultural significance. The term includes such forms as a lava tube, natural pit, sinkhole, underwater cave, or other feature that is an extension of the entrance.” In the past, staff have not considered the sea caves along the Na Pali coast as within the boundaries of the NAR. The boundary of Hono o Na Pali NAR follows the shoreline and does not include marine waters (cf. Ahihi-Kinahu). As any boat entering a sea cave would enter from, and remain within, marine waters, staff believe that the boat would not enter into the NAR, and thus, 13-209-4(18) would not apply.

Recommendation: No change.

Issue 13: The intent of the proposed changes to 13-209-4 appears to be to exclude the public from NARS. I oppose that.

Response: The intent of the proposed rule changes is to enhance the ability of the Department to manage and protect the natural area reserve system and the unique natural and cultural resources found within these areas. In 1970, the Legislature established the natural area reserves system, recognizing that the State possess unique resources, many of which are found nowhere else in the world and which are highly vulnerable to loss, and that these unique natural assets should be protected and preserved and that a statewide NARS system be established to preserve in perpetuity land and water areas which support

communities of the natural flora and fauna, as well as geological sites, of Hawaii. While these are public lands, the mandate of the State is to preserve these areas to prevent damage or loss of the unique features. Unfortunately, in some cases, this may require limiting public access.

Recommendation: No change.

13-209-4.5 Closing of areas

13-209-4.6 Visiting hours

Issue 14: The proposed rules regarding closure and establishment of visiting hours, by allowing the Board “or its authorized representative” to close areas or establish visiting hours, give too much discretion to the Chairperson to close areas or restrict public access without a public hearing. Delegating this type of decision to an ‘authorized representative’ may not be appropriate. Delegating this type of authority to the Chairperson is inappropriate and would give him the ability to restrict access to public lands.

Response: The Board would have to delegate this authority to a specific ‘authorized representative’ during a regular Board meeting before any entity other than the Board would have the power to close areas or establish visiting hours. Further, the proposed rules require the approval of the NARS Commission before closure can occur, whether by the Board or by an authorized representative. As a duly appointed commission, the NARS Commission can only act during a regularly scheduled publicly noticed meeting. Staff believes this process is sufficient to ensure that closures of public lands do not occur indiscriminately, but only where needed to protect the unique resources for which the natural area reserve was established.

Recommendation: No change.

Issue 15: Before any closure to a NAR takes place, there needs to be a public process and scientific justification for such a closure. There needs to be a public hearing and public oversight and review. It may not be fair to close one area to the detriment of another area (e.g., closing one part of a NAR so another portion then becomes highly used, etc.).

Response: The proposed rules do not provide for immediate closure of any reserve. Instead, the proposed rules provide the authority to the Board, with the approval of the NARS Commission, to close or restrict public use of all or a portion of a reserve when deemed necessary by the commission for the protection of the natural, geological, or cultural resources of the area of the safety and welfare of persons or property. Thus, before any closure takes place, there must be a finding by the NARS Commission, at a regularly scheduled publicly noticed meeting, that closure is necessary for the protection of the natural, geological, or cultural resources of an area. Then, the Board or its authorized representative must agree that closure is appropriate (otherwise, the Board would not approve the proposed closure). Staff believes this process is sufficient to ensure that closures of public lands do not occur indiscriminately, but only where needed to protect the unique resources for which the natural area reserve was established.

Recommendation: No change.

Issue 16: Hunting needs to be subject to closures and visiting hours.

Response: Under the proposed rules, as written, hunting is not subject to closure pursuant to 13-209-4.5 or visiting hours established pursuant to 13-209-4.6; rather hunting is limited strictly by the hunting rules of the department (13-209-3). The hunting rules of the department provide that areas may be closed to public hunting by the board or its authorized representative when “deemed to be in the public interest” (HAR § 13-123-4). Whether suspension of hunting is appropriate as part of a proposed closure of a NAR should be determined on a case-by-case basis. In some cases, public hunting may be needed to control game animal populations. Because the tools exist to suspend public hunting if needed, staff recommends no changes.

Recommendation: No change.

Issue 17: Fishing should not be subject to closures or visiting hours.

Response: Staff believes that whether a proposed closure or visiting hours should apply to fishermen should be determined on a case-by-case basis based on the circumstances justifying a proposed closure or establishment of visiting hours, treating this user group the same as any other public user group. Thus, staff recommends making no changes.

Recommendation: No change.

Issue 18: Regarding closure, two years is too long a time.

Response: The terms of a closure would be established by the Board, with the approval of the NARS Commission, based on a finding that closure is deemed necessary for the protection of the natural, geological, or cultural resources of the area of the safety and welfare of persons or property. Two years is a long enough period to conduct monitoring and initial evaluation to determine if the closure is beneficial, while limiting the closure to only two years at a time ensures regular review of the condition and status of the NAR and continued assessment on whether the closure is necessary, so that the public is not unnecessarily excluded from public lands.

Recommendation: No change.

Issue 19: Public lands should not be subject to closure; instead, these lands should be available for all to use. If some are using the public lands unwisely, then the Department should address the actions of those people, not everyone. I oppose the idea of closure; it is simply some private groups trying to close off certain public lands from use by others.

Response: The intent of the proposed rule changes is to enhance the ability of the Department to manage and protect the natural area reserve system and the unique natural and cultural resources found within these areas. In 1970, the Legislature established the natural area reserves system, recognizing that the State possess unique resources, many of which are found nowhere else in the world and which are highly vulnerable to loss, and that these unique natural assets should be protected and preserved and that a statewide NARS system be established to preserve in perpetuity land and water areas which support communities of the natural flora and fauna, as well as geological sites, of Hawaii. While these are public lands, the mandate of the State is to preserve these areas to prevent damage or loss of the unique features. Unfortunately, in some cases, human activity is the greatest threat to these unique natural resources, and long-term protection may require limiting public access.

Recommendation: No change.

13-209-5 Special use permits

Issue 20: 13-209-5 allows the Commission, or its authorized representative, to review and approve special use permits. It is important for the Commission, rather than an authorized representative, to review permits for commercial use or for activities which could impact a reserve.

Response: The proposed rules provide flexibility for the Commission to delegate authority to review and approve permits to an authorized representative. If the Commission decides to delegate some of its authority to an authorized representative, the Commission would have to define and approve such a delegation at a regularly scheduled Commission meeting, where the public would have an opportunity to comment on whether such a delegation is appropriate. Some permit applications have limited impact on the natural resources and could be reviewed more quickly and efficiently by staff, rather than having to wait for a regularly scheduled NARS Commission meeting.

Recommendation: No change.

Issue 21: 13-209-5(b) provides that no permit may be valid for more than one year. There may be instances where having a long-term permit is appropriate. Examples would be permits issued to other governmental agencies pursuant to a Memorandum of Agreement that outlines a cooperative relationship between the State and the other agency (such as the Tropical Experimental Forest).

Response: Staff agrees.

Recommendation: Modify the language of 13-209-5(b) as follows:

“ No permit may be valid for more than one year from date of issuance. The Board may waive this restriction for permits issued to other governmental agencies where the Board determines such a waiver to be in the best interest of the State.”

In addition, modify the language of 13-209-5.5 (a)(3) as follows:

“The period of time for which the permit is requested, not to exceed one year unless seeking a waiver pursuant to section 13-209-5(b).”

Issue 22: 13-209-5(c) provides standard conditions on all permits: (3) states that hiking clothing and equipment shall be free of seeds or dirt. ‘Hiking’ should be removed, so this applies to all clothing (not just hiking clothes). ‘Vehicles’ should be added as an item to be free of seeds or dirt. (c) also refers to ‘project’ rather than ‘permit.’

Response: Staff believes these are valid technical suggestions.

Recommendation: Modify the language of 13-209-5(c) as follows:

“(c) All special-use permits shall be subject to standard conditions, as approved by the board, including but not limited to the following:

- (1) The permittee shall adhere to specifications given in the permit application;
- (2) Disturbance of vegetation and wildlife shall be avoided as much as possible;
- (3) Precautions shall be taken to prevent introductions of plants or animals not naturally present in the area. The permittee is responsible for making sure that participants’ clothes, equipment, and vehicles are free of seeds or dirt to lessen the chance of introducing any non-native plants or soil animals. Should an

infestation develop attributable to permittee, the permittee is responsible for eradication by methods specified by the department;

- (4) This permit is not transferable;
- (5) This permit does not exempt the permittee from complying with any other applicable rule or statute;
- (6) The State of Hawaii shall be released and held harmless from any and all liability for injuries or death, or damage or loss of property however occurring during any activity related to this permit."

Issue 23: The proposed rules identify how the Board can revoke a permit; the rules should provide a method by which the Board could revise a permit.

Response: While this is a good suggestion, staff believe it is unnecessary at this time. In practice, few if any permits have required modification. The primary reason for this section was to ensure the Board had the authority to revoke permits should it become clear that the proposed special-use was impacting the NAR (based on unanticipated impacts, changed circumstances, etc.).

Recommendation: No change.

Issue 24: The proposed rules should provide a method by which the NARS Commission could initiate steps to revoke a permit should the Board fail to act.

Response: The NARS Commission is an advisory body to the Board and has the ability to make recommendations to the Board on any subject, including on whether to revoke a permit. At the present time, staff believes that additional procedures are not necessary.

Recommendation: No change.

Issue 25: Volunteers working with DLNR should be exempt from permit requirements.

Response: Volunteers working under the direct supervision and guidance of NARS managers would not be required to acquire a separate permit. However, volunteers operating outside the direct supervision of NARS staff are required to get permits. This process ensures that volunteers are doing appropriate work that is consistent with the management being performed by DLNR staff and coordinated with other projects.

Recommendation: No change.

13-209-5.5 Applications for special-use permits

Issue 26: Application fee - The application fee of \$50 is too high for researchers or educators; the application fee is too low for commercial activities; the application fee for commercial activities should be a percentage of their estimated income. Specifying an application fee in the rules reduces flexibility to increase or decrease it in the future; instead, the rules should state that an application fee "established by the Department" will be charged to allow more flexibility over time.

Response: Staff agrees that specifying an application fee in the rules would reduce flexibility and limit changing the fee over time to reflect actual costs. However, the division has been advised that providing in the rule that the application fee shall be 'established by the Department' constitutes ad-hoc rulemaking and is not permissible. Staff also agrees that it may be appropriate in some cases to reduce or waive the

application fee. It should be noted that the application fee is not proposed as a money-maker, but to defray the real costs involved in reviewing permit applications. At the same time, staff believes that there are instances where a waiver of the application fee may be appropriate. For example, school groups conducting educational hikes (an activity which does not currently require a permit, but would under the proposed amendments), Native Hawaiians conducting traditional and customary practices, or an activity which provides a special or unique benefit to the NARS system could be appropriate for fee waiver.

Recommendation: Modify the language of 13-209-5.5(a)(10) as follows:

“An application fee of \$50, however, the board or its authorized representative may waive the application fee if, in their opinion, the waiver is in the public interest or benefits the State.”

Issue 27: The State could implement a user fee system tied in with the permits, to fund education or enforcement specific to that site.

Response: The purpose of the permit system to increase the ability of the Department to manage activities that occur within the NARS system, so that the unique natural and cultural resources within the NARS can be protected. The majority of permit applications are research-related, and the results of the research contribute to improved management of the reserve. Research does not typically generate revenue and is often funded by grants, so any user fee would reduce the amount of funding available to support the proposed research. Given the relatively low volume of applications, it is unlikely that a user fee system would generate sufficient revenue to adequately support education or enforcement efforts. Further, staff believes that statutory changes would be required to earmark any user fees for specific uses in specific areas.

Recommendation: No change.

Issue 28: The rules should require a permit application to state the frequency of a proposed use (one-time; once a month, etc.).

Response: The proposed rules require an applicant to describe the proposed special-use and note the period of time for which the permit is requested. It is anticipated that these two criteria will prompt an applicant to state the frequency and duration of their proposed special-use so that the Commission could evaluate the application under the criteria in subsection (b). Subsection (c) notes that the burden is on the applicant to demonstrate that the special-use is consistent with the stated criteria; so if this is information needed by the Commission in making its determination, but if it is omitted, then the Commission has the ability to deny the application.

Recommendation: No change.

Issue 29: The permit application process should be flexible enough to allow use of volunteers, the names of whom might not be known far enough in advance to include on the permit at the time of application.

Response: The proposed rules simply provide that an application contain (1) the name of the applicant; (2) contact information; (3) the period of time for which the permit is requested; (4) the reserve(s) involved; (5) a map; (6) a description of the proposed special use; (7) a discussion of the proposed special use satisfies the criteria; (8) an assessment of the potential environmental impact the special-use may have; (9) signature of the

applicant; (10) an application fee; and (11) any other information required by the department. The rules do not require that every volunteer involved be listed. Instead, the rules do provide flexibility – an applicant could apply for a permit to lead a volunteer weed removal trip without listing every volunteer. (At the same time, it could be expected for them to give estimates of how many volunteers are anticipated so that the NARSC could evaluate possible impacts and possible benefits).

Recommendation: No change.

Issue 30: Section 13-209-5.5(a)(8): the proposed rule is vague as to what is required to meet (a)(8) (a formal EA or something less?). We oppose requiring a full EA for every application.

Response: The intent of the proposed rule is to ensure that an applicant considers the environmental impact their proposed special-use has on the reserve or the surrounding area. In some cases, such as a routine hike on existing trails by a school group of more than ten people, a short statement by the applicant will be sufficient. For more complex requests, it may be appropriate for the NARSC to request an applicant to prepare an environmental assessment in compliance with HRS Chapter 343 in order to provide the information needed to evaluate the permit application. As stated in 13-209-5.5(c), the applicant has the burden to demonstrate that the proposed special-use is consistent with the criteria outlined in 13-209-5.5(b).

Recommendation: No change.

Issue 31: Section 13-209-5.5(b)(3): an applicant cannot comply with this requirement if a NAR does not have a management plan.

Response: Most NARS do have a management plan. However, for the few that do not, this criteria will not apply, and the permit application would be evaluated based on the other criteria. The NARS program intends to complete management plans for all NARS within the next year.

Recommendation: No change.

Issue 32: Section 13-209-5.5(b)(4): the requirement for an applicant to show the proposed use provides a benefit is an undue burden to an applicant.

Response: The purpose of NARS system to protect unique biological and geological for future generations. Part of protecting these areas is to regulate public use. 13-209-5.5(b)(4) does not apply to all public use in a reserve, but only to those activities that require a permit. As such, staff believes that it is reasonable for someone seeking permission to conduct an otherwise prohibited activity to demonstrate that their proposed use provides a benefit, rather than harms, a reserve.

Recommendation: No change.

Issue 33: Review of applications should be timely (15-45 days), especially for educational uses. The process for review of applications should be flexible to accommodate special situations (such as if there's a need for immediate decision).

Response: Staff make best efforts to review all permit applications on a timely basis; however, some permits require longer to review, for reasons such as an incomplete or unclear initial application, limited staffing or planned field operations, or the uniqueness

or potential impact of the proposed special-use. Thus, setting a minimum time for approval is not advisable. In addition, until the proposed rule changes are approved to authorize the Commission to delegate authority to approve certain permits, all permits must be approved by the Commission at a regularly scheduled meeting, which currently take place every 2 months. The proposed rule changes are designed to increase the speed and flexibility of the permit review process.

Recommendation: No change.

Issue 34: Automatic approval of permits is not appropriate.

Response: HRS § 91-13.5 (enacted in 1998) provides that agencies shall adopt rules that specify a maximum time period to grant or deny a business or development related permit, license or approval. An “application for a business or development related permit, license or approval” is defined as any state or county application, petition, permit, license, certificate, or any other form of a request for approval required by law to be obtained prior to the formation, operation, or expansion of a commercial or industrial enterprise. A special use permit issued by the Board, with the approval of the Commission, is required prior to conducting a commercial use in a NAR. Thus, the automatic approval provision is included in the proposed rules to meet the requirements of HRS § 91-13.5. However, because some permit applications could require additional review and discussion and the NARS Commission does not meet frequently, staff recommends modifying the section to extend the time period to 270 days before automatic approval would occur.

Recommendation: Modify the language of 13-209-5.5(e) as follows:

“(e) If within two hundred seventy days after the department’s acceptance of a completed application, the board or its authorized representative shall fail to render a decision thereon, the application for a special-use permit shall be automatically approved with the standard conditions outlined in section 13-209-5(c), provided that the board may revoke this approval pursuant to section 13-209-5(g) and (h). The two-hundred-seventy-day time period provided shall not commence until a completed application is accepted by the department. Physical receipt of an application by the department does not constitute acceptance. The two-hundred-seventy-day time period for decision may be extended for another one hundred eighty days at the request of the applicant to give the board additional time to review and make a decision on the application.”

Issue 35: Permit requirements are too restrictive.

Response: Staff disagrees. The State has a mandate to protect the resources of the natural area reserve system; the proposed permit requirements were developed to ensure that the Commission and the Board have all appropriate and necessary information when reviewing a permit application, to prevent degradation and harm to the natural resources.

Recommendation: No change.

Issue 36: The Department should not be deterring educational use of NARS (through a restrictive or expensive permit system), as educational use increases awareness and support for natural resource protection. As drafted, the permit process discourages educational use by requiring a permit for groups larger than 10, having an expensive

application fee, requiring insurance that might be impossible to acquire, and making scheduling difficult by having a long permit processing timeframe.

Response: Staff agree that educational use of a NAR can increase understanding and support for the need to protect Hawaii's unique resources. At the same time, large groups can have a significant impact on the resources of a reserve, depending upon the size of the group, the number of groups visiting a reserve, the climate/condition when the group is visiting, the area being visited, and the condition of the resources in that area, and resource protection is more important than educational use in a NARS. In addition, managers need a way to manage when large groups visit – so that 2 school groups don't come at the same time on the same day, or so that a group doesn't come during intensive management operations. Staff believe that the permit process is reasonable and will not unduly discourage educational use of a NAR.

Recommendation: No change.

Proposed additions

Issue 37: The rules do not define "camping" so it is unclear when legal fishing activities become camping (and thus illegal) – fishermen typically have cots, lanterns, tents, etc.

Response: To enhance DOCARE's ability to enforce this rule, a definition of camping would be helpful. Under the rules adopted by the Department for forest reserves or for state parks, many fishermen could be subject to citation for camping. ["Camping" is defined by the Forest Reserve rules (13-104) as meaning "being in possession of a backpack, tents, blankets, tarpaulins, or other obvious camping paraphernalia, any time after one hour after sundown until sunrise in a forest reserve." "Camping" is defined by the State Parks rules (13-146) as meaning "remaining within a designated camping area during closed hours or remaining within a state park while in possession of a sleeping bag, tent, tarpaulin, or other camping paraphernalia within the state park one hour after sunset until sunrise."] However, the State unencumbered land rules (13-221) define "camping" as "an act of sleeping during night time hours on the premises by one or more persons who remain or intend to remain past the hour of twelve midnight." Thus, fishermen actively fishing under the unencumbered land rules would not be subject to citation for camping (as they are not sleeping, but fishing). While, as noted previously, the Division does not intend with these rule changes to limit or restrict existing fishing offshore of NARS, at the same time, the Division has the mission to protect the natural resources within the natural areas and does not want people who are not legitimately fishing to claim they are as a means to avoid citation for illegal camping.

Recommendation: Adding a definition of camping to the rules at this point would require going out for public hearing again. Because the proposed rule changes provide another mechanism (the establishment of visiting hours) to address the issue of unauthorized camping should this become a problem in a NAR, staff recommends no change.

Issue 38: Amend the rules to include a ban on evidence of illegal drug activity.

Response: The use of illegal drugs is already prohibited under State law, whether on State or private land.

Recommendation: No change.

Issue 39: Amend the rules to include a ban on alcohol, drugs, explosives, firearms, traps, etc.

Response: Adding provisions to ban these items would require additional public hearings. As these are not currently serious problems within the NARS, staff recommend deferring these proposed bans until the next rule changes. And, to a certain extent, the proposed rules would address these problems (see 13-209-4(19)).

Recommendation: No change.

Issue 40: Amend the rules to include a provision regarding abandoned/unattended property.

Response: The current rules prohibit littering or the deposit of refuse or any other substance and has been sufficient to address previous issues of abandoned property. Adding a provision regarding abandoned/unattended property is unnecessary at this time.

Recommendation: No change.

Issue 41: Amend the rules to include a prohibition on fish feeding.

Response: The NARS, with the exception of Ahihi-Kinau, do not include marine waters, so the suggested prohibition would be limited to Ahihi-Kinau. In comparison to actions like poaching, fish feeding is not a big problem, and can most likely be addressed through outreach and education. Further, if fish feeding does escalate into a serious problem, staff believe that fish feeding can be restricted in this NAR without additional rule changes, under 13-209-4(19) as an 'activity inconsistent with the purpose and intent of the NARS.'

Recommendation: No change.

Issue 42: Amend the rules to include a prohibition on sleeping in a vehicle.

Response: Presumably, this comment was directed towards responding to future instances of people sleeping in cars at night within a NAR. Should the proposed rule changes be approved, and people sleeping in a NAR becomes problematic, the Department will have the ability to establish visiting hours and limit this activity through another mechanism.

Recommendation: No change.

Miscellaneous comments

Issue 43: New rules are not needed; instead, the Department needs to better enforce existing rules or have increased on-site presence.

Response: The Department agrees that increased on-site presence and enforcement of existing rules can address some issues and improve management of certain NARS. However, over the years, there have been occasions where shortcomings in the existing rules have made them difficult to enforce. Many of the proposed rule changes address these shortcomings.

Recommendation: No change.

Issue 44: New rules are not needed; instead, the Department needs to incorporate more community involvement in management.

Response: The Department agrees that increased community involvement can address some issues and improve management of certain NARS. However, over the years, there have been occasions where shortcomings in the existing rules have made it difficult to efficiently or effectively respond to threats to the NARS. Many of the proposed rule changes address these shortcomings.

Recommendation: No change.

Issue 45: Violations should have a stiffer penalty for repeat offenders.

Response: The NARS statute (HRS § 195-8) currently provides for increased penalties for repeat offenders. Increasing the penalties for first-time and repeat offenders can be done only by legislation, not by rule change.

Recommendation: No change.

Issue 46: Opposition to expansion of the NARS into marine waters.

Response: The opposition is noted. At this time, there are no plans to extend the NARS into marine waters. Should marine waters be proposed for inclusion into the NARS system in the future, a separate process including a public hearing would take place, giving people the opportunity to comment on the specific proposal at that time.

Recommendation: No change.

Issue 47: The rules should specify how the NARS Commission integrates with the Board.

Response: This issue is already sufficiently covered by HRS Chapter 195, HAR Chapters 13-208, 13-209, and 13-210. For example, HRS § 195-7 specifies the powers and duties of the Commission. Expanding or altering these powers and duties would require legislative action, rather than rule changes.

Recommendation: No change.

Issue 48: The marine waters of Ahihi-Kinau should be reopened, as the science supporting a closure to fishing has not been shown.

Response: Ahihi-Kinau was established in 1973 as the first NAR. At that time, numerous surveys were done, confirming that the nearshore waters were of unique importance and in need of long-term protection. Almost immediately upon establishment of the NAR, the marine waters were closed to fishing. After 30 years of closure to fishing, the marine waters off Ahihi-Kinau are some of the healthiest on Maui. Recent surveys demonstrate that the area still contains unique and rare marine communities, some of which are found nowhere else in the main Hawaiian Islands. The community on Maui supports the continued protection of Ahihi-Kinau and would likely object to reopening this area to fishing.

Recommendation: No change.

Issue 49: The rules do not recognize the rights of Hawaiian cultural practitioners. The rules should not preclude use of an area for currently practiced Hawaiian rights. The rules should respect PASH and following court decisions regarding Native Hawaiian rights for access and cultural practices. The Department needs to research Native Hawaiian practices to see if the rules will impact them.

Response: The purpose of the NARS system is to protect unique biological and geological for future generations. The proposed rule changes are designed to enhance protection of these areas, so that the unique natural and cultural resources found within them remain intact for the benefit of future generations. The NARS rules do not prohibit cultural practices; instead, they simply require practitioners to seek a permit if they propose to do certain activities which may harm or degrade the reserve. For example, an individual seeking to go into the forest for inspiration or to learn how to identify native plants with cultural significance requires no permit. However, an individual who seeks to collect plant or animal material, or an individual who wishes to go with a large group, does need to get a permit first. Otherwise, the State would have no way to monitor this use, to consider it when evaluating other permit applications, and to prevent harm or loss of the resources the State is mandated to protect. In developing the rule changes, staff have tried to clarify the permit process, so that it is easier for both cultural practitioners and other permit applicants to negotiate the permit process. Under PASH, the government has an affirmative duty to protect the reasonable exercise of traditional and customary rights of Hawaiians on land less than fully developed. Staff believes that the permit process does protect the reasonable exercise of traditional and customary rights of Hawaiians within a NAR, by providing a mechanism for the State to identify and prevent unreasonable use. If the State had no method to manage unreasonable use, this would adversely impact reasonable use. For example, if the permit process did not apply to cultural use, an individual could remove all the maile in a forest, claiming it was for cultural purposes, leaving none for other cultural practitioners. Similarly, people collecting for another purpose but without a permit could claim, if confronted by DOCARE, that they were exercising cultural rights, making enforcement difficult. The Division believes that the permitting process provides the best long-term protection for cultural uses.

Recommendation: No change.

Issue 50: All application fees should not go into the general fund.

Response: The question of where application fees are deposited is beyond the scope of these administrative rules.

Recommendation: No change.

Issue 51: The right to fish and the right of access to the ocean should be explicitly protected by the rules.

Response: The Department of Aquatic Resources has the expertise and authority to determine appropriate fishing rules for the State. Because DAR may determine that it is appropriate to limit fishing in the marine waters adjacent to the few NARS located along a shoreline, staff does not recommend incorporating this suggestion into the proposed rules.

Recommendation: No change.

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Amendments to Hawaii Administrative Rules Chapter 13-209

(Date of Board meeting where adopted)

1. Section 13-209-3, Hawaii Administrative Rules, is amended to read as follows:

"§ 13-209-3 Permitted activities. Hiking[, and nature study[, and bedroll camping without a tent or other temporary structure] of group size of ten or less are permitted except where restricted pursuant to sections 13-209-4.5 and 13-209-4.6. Hunting is a permitted activity pursuant to hunting rules of the department." [Eff 6/29/81; am] (Auth: HRS § 195-5) (Imp: HRS § 195-5)

2. Section 13-209-4, Hawaii Administrative Rules, is amended to read as follows:

"§ 13-209-4 Prohibited activities. The following activities are prohibited within a natural area reserve:

- (1) To remove, injure, or kill any form of plant or animal life, except game mammals and birds hunted according to department rules;
- (2) To introduce any form of plant or animal life, except dogs when permitted by hunting rules of the department and service animals accompanying their handlers;
- (3) To remove, damage, or disturb any geological or paleontological features or substances;
- (4) To remove, damage, or disturb any historic or prehistoric remains;
- (5) To remove, damage, or disturb any notice, marker, or structure;
- (6) To engage in any construction or improvement;
- (7) To engage in any camping activity [that involves the erecting of a tent or other temporary structure] or to establish a temporary or permanent residence;
- (8) To start or maintain a fire;
- (9) To litter, or to deposit refuse or any other substance;
- (10) To operate any motorized or unmotorized land vehicle or air conveyance of any shape or form in any area, including roads or trails, not designated for its use;
- (11) To operate any motorized water vehicle of any shape or form in freshwater environments, including bogs, ponds, and streams, or marine waters, except as

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- otherwise provided in the boating rules of the department [of transportation, State of Hawaii];
- (12) To enter into, place any vessel or material in or on, or otherwise disturb a lake or pond;
 - (13) [No person shall] To engage in commercial activities of any kind in a natural area reserve without a written [special use] special-use permit from the board or its authorized representative[.];
 - (14) To have or possess the following tools, equipment, or implements: fishing gear or devices within Ahihi-Kinau natural area reserve, including but not limited to any hook-and-line, rod, reel, spear, trap, net, crowbar, or other device that may be used for the taking, injuring, or killing of marine life; cutting or harvesting tools or gear, including but not limited to chainsaws, axes, loppers, any mechanized or manual sawtooth tool, seed pickers, or machete, that may be used for the taking, injuring, or killing of plant life; and hunting gear or tools that may be used for the taking, injuring, or killing of wildlife, except as permitted by the hunting rules of the department;
 - (15) To hike, conduct nature study, or conduct any activity with a group larger than ten in size;
 - (16) To be present in an area closed pursuant to section 13-209-4.5 or after visiting hours established pursuant to section 13-209-4.6;
 - (17) To anchor any motorized or nonmotorized water vehicle of any shape or form in the marine waters of Ahihi-Kinau natural area reserve;
 - (18) To enter into any cave, as defined in section 6D-1, Hawaii Revised Statutes, or any portion thereof;
 - (19) To conduct any other activity inconsistent with the purpose and intent of the natural area reserves system." [Eff 6/29/81; am 12/9/02; am 7/3/03; am] (Auth: HRS § 195-5) (Imp: HRS § 195-5)

3. Chapter 13-209, Hawaii Administrative Rules, is amended by adding a new section 13-209-4.5 to read as follows:

"§ 13-209-4.5 Closing of areas. The board or its authorized representative, with the approval of the commission, may close or restrict the public use of all or any portion of a natural area reserve for up to two years, when deemed necessary by the commission for the protection of the natural, geological, or cultural resources of the area or the safety and welfare of persons or property, by the posting of appropriate signs indicating the duration, extent, and scope of closure. Closures may be renewed with the approval of the board or its authorized representative and the commission.

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All persons shall observe and abide by the officially posted signs designating closed areas." [Eff] (Auth: HRS § 195-5) (Imp: HRS § 195-5)

4. Chapter 13-209, Hawaii Administrative Rules, is amended by adding a new section 13-209-4.6 to read as follows:

"§ 13-209-4.6 Visiting hours. The board or its authorized representative, with the approval of the commission, may establish a reasonable schedule of visiting hours for all or portions of a natural area reserve by the posting of appropriate signs indicating the hours during which the natural area reserve may be accessed. All persons shall observe and abide by the officially posted signs designating visiting hours." [Eff] (Auth: HRS § 195-5) (Imp: HRS § 195-5)

5. Section 13-209-5, Hawaii Administrative Rules, is amended to read as follows:

"§ 13-209-5 Special-use permits. (a) The board or its authorized representative, with the approval of the commission or its authorized representative, may issue permits to conduct activities otherwise prohibited by section 13-209-4 for research, education, management, or for any other purpose consistent with chapter 195, Hawaii Revised Statutes.

[(b) The board or the commission may require a permit application to include an assessment of the potential environmental effect the special-use may have on the area concerned.]

(b) No permit may be valid for more than one year from date of issuance. The board may waive this restriction for permits issued to other governmental agencies where the board determines such a waiver to be in the best interest of the State.

(c) All special-use permits shall be subject to standard conditions, as approved by the board, including but not limited to the following:

- (1) The permittee shall adhere to specifications given in the permit application;
- (2) Disturbance of vegetation and wildlife shall be avoided as much as possible;
- (3) Precautions shall be taken to prevent introductions of plants or animals not naturally present in the area. The permittee is responsible for making sure that participants' clothes, equipment, and vehicles are free of seeds or dirt to lessen the chance of introducing any non-native plants or soil animals. Should an infestation develop attributable to permittee, the permittee is responsible for

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- eradication by methods specified by the department;
- (4) This permit is not transferable;
- (5) This permit does not exempt the permittee from complying with any other applicable rule or statute;
- (6) The State of Hawaii shall be released and held harmless from any and all liability for injuries or death, or damage or loss of property however occurring during any activity related to this permit.
- (d) The board or its authorized representative may attach special conditions on the special-use permit, including but not limited to reporting requirements, limitations on the size of groups or the length of time for which the permit is valid. Failure to comply with any of these conditions shall render a permit void.
- (e) All permittees shall carry the permit with them at all times while in the reserve and shall, upon request, show the permit to any law enforcement officer or the board or its authorized representative.
- (f) Permits are not transferable. If the permittee is a partnership, joint venture, or corporation, the sale or transfer of 25 percent or more of ownership interest or stocks by dissolution, merger, or any other means, shall be deemed a transfer for purposes of this subsection and subject to the right of the department to terminate this permit effective the date of the sale or transfer.
- (g) The board or its authorized representative may revoke or cancel a permit without prior notice when an emergency is declared by the department or other proper authority or when the special-use poses an immediate threat to the health, safety, and welfare of the public or natural, geological, or cultural resources of the reserve.
- (h) The board or its authorized representative may revoke or cancel any permit with thirty days written notice:
- (1) For any infraction of the terms and conditions of the permit;
- (2) Upon a finding that the special-use threatens to damage the integrity or condition of the natural, geological, or cultural resources in the reserve;
- (3) Upon a finding that the special-use poses a threat to the health, safety, or welfare of the general public or otherwise negatively impacts the general public's use and enjoyment of the reserve; or
- (4) Upon closure of a reserve pursuant to section 13-209-4.5.
- [(c)](i) The provisions of this section shall not exempt the applicant from complying with any other applicable rule or statute." [Eff 6/29/81; am] (Auth: HRS § 195-5)(Imp: HRS § 195-5)

6. Chapter 13-209, Hawaii Administrative Rules, is

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amended by adding a new section 13-209-5.5 to read as follows:

"§ 13-209-5.5 Applications for special-use permits. (a)
All applications for special-use permits shall be submitted in writing to the board or its authorized representative on the form prescribed by the department. The application shall contain the following information:

- (1) Name of applicant, and if relevant, affiliation and title;
- (2) Contact information, including name of primary contact, mailing address, phone number, and if available, email address;
- (3) The period of time for which the permit is requested, not to exceed one year unless seeking a waiver pursuant to section 13-209-5(b);
- (4) The reserve(s) involved;
- (5) A map illustrating the reserve and the location within the reserve of the proposed special-use;
- (6) A description of the proposed special-use;
- (7) A discussion of how the proposed special-use satisfies subsections (b)(1) through (b)(6);
- (8) An assessment of the potential environmental impact the special-use may have on the reserve or the surrounding area;
- (9) Signature of the applicant;
- (10) An application fee of \$50, however, the board or its authorized representative may waive the application fee if, in their opinion, the waiver is in the public interest or benefits the State; and
- (11) Any other information as determined by the department.

(b) In evaluating the merits of an application for a special-use permit, the board or its authorized representative shall apply the following criteria:

- (1) The proposed special-use cannot be conducted elsewhere;
- (2) The proposed special-use is consistent with the purpose and objectives of the natural area reserve system;
- (3) The proposed special-use is consistent with the management plan developed for the reserve;
- (4) The proposed special-use provides a benefit (direct or indirect) to the natural area reserve system or to the individual reserve(s) or both;
- (5) The proposed special-use will not damage or threaten to damage the integrity or condition of the natural, geological, or cultural resources in the natural area reserve and adjacent area or region;
- (6) The proposed special-use complies with provisions

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and guidelines contained in Chapter 205A, Hawaii Revised Statutes, entitled "Coastal Zone Management", where applicable; and

(7) The applicant shall have complied with, or be in compliance with, the conditions of any previously approved permit.

(c) The applicant shall have the burden of demonstrating that the proposed special-use is consistent with the criteria in subsection (b).

(d) The board or its authorized representative may hold a public hearing on an application where determined by the chairperson that the scope of the proposed special-use or the public interest requires a public hearing on the application. Notice of the hearing shall be given not less than twenty days prior to the date set for the hearing. Notice of the time and place of the hearing shall be published at least once in a newspaper in the county where the natural area reserve is located.

(e) If within two hundred seventy days after the department's acceptance of a completed application, the board or its authorized representative shall fail to render a decision thereon, the application for a special-use permit shall be automatically approved with the standard conditions outlined in section 13-209-5(c), provided that the board may revoke this approval pursuant to section 13-209-5(g) and (h). The two-hundred-seventy-day time period provided shall not commence until a completed application is accepted by the department. Physical receipt of an application by the department does not constitute acceptance. The two-hundred-seventy-day time period for decision may be extended for another one hundred eighty days at the request of the applicant to give the board additional time to review and make a decision on the application." [Eff] (Auth: HRS §§ 195-5, 91-13.5) (Imp: HRS §§ 195-5, 91-13.5)

7. Material, except source notes, to be repealed is bracketed. New material is underscored.

8. Additions to update source notes to reflect these amendments are not underscored.

9. These amendments to chapter 13-209, Hawaii Administrative Rules, shall take effect ten days after filing with the Office of the Lieutenant Governor.

I certify that the foregoing are copies of the rules, drafted in the Ramseyer format pursuant to the requirements of section 91-4.1, Hawaii Revised Statutes, which were adopted on 2006, and filed with the Office of the Lieutenant Governor.

Ramseyer

PETER T. YOUNG
Chairperson, Board of Land and
Natural Resources

APPROVED AS TO FORM:

Deputy Attorney General

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DEPARTMENT OF LAND AND NATURAL RESOURCES

Amendments to Chapter 13-209

Hawaii Administrative Rules

(Date approved by Board)

SUMMARY

1. § 13-209-3 is amended.
2. § 13-209-4 is amended.
3. A new § 13-209-4.5 is added.
4. A new § 13-209-4.6 is added.
5. § 13-209-5 is amended.
6. A new § 13-209-5.5 is added.

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§ 13-209-3 Permitted activities. Hiking and nature study of group size of ten or less are permitted except where restricted pursuant to sections 13-209-4.5 and 13-209-4.6. Hunting is a permitted activity pursuant to hunting rules of the department. [Eff 6/29/81; am] (Auth: HRS § 195-5) (Imp: HRS § 195-5)

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§ 13-209-4 Prohibited activities. The following activities are prohibited within a natural area reserve:

- (1) To remove, injure, or kill any form of plant or animal life, except game mammals and birds hunted according to department rules;
- (2) To introduce any form of plant or animal life, except dogs when permitted by hunting rules of the department and service animals accompanying their handlers;
- (3) To remove, damage, or disturb any geological or paleontological features or substances;
- (4) To remove, damage, or disturb any historic or prehistoric remains;
- (5) To remove, damage, or disturb any notice, marker, or structure;
- (6) To engage in any construction or improvement;
- (7) To engage in any camping activity or to establish a temporary or permanent residence;
- (8) To start or maintain a fire;
- (9) To litter, or to deposit refuse or any other substance;
- (10) To operate any motorized or unmotorized land vehicle or air conveyance of any shape or form in any area, including roads or trails, not designated for its use;
- (11) To operate any motorized water vehicle of any shape or form in freshwater environments, including bogs, ponds, and streams, or marine waters, except as otherwise provided in the boating rules of the department;
- (12) To enter into, place any vessel or material in or on, or otherwise disturb a lake or pond;
- (13) To engage in commercial activities of any kind in a natural area reserve without a written special-use permit from the board or its authorized representative;
- (14) To have or possess the following tools, equipment, or implements: fishing gear or devices within Ahihi-Kinau natural area reserve, including but not limited to any hook-and-line, rod, reel, spear, trap, net, crowbar, or other device that may be used for the taking, injuring, or killing of marine life; cutting or harvesting tools or gear, including but not limited to chainsaws, axes, loppers, any mechanized or manual sawtooth tool, seed pickers, or machete, that may be used for the taking, injuring, or killing of plant life; and hunting gear or tools that may be used for the taking, injuring, or killing of wildlife, except as permitted by the

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- hunting rules of the department;
- (15) To hike, conduct nature study, or conduct any activity with a group larger than ten in size;
- (16) To be present in an area closed pursuant to section 13-209-4.5 or after visiting hours established pursuant to section 13-209-4.6;
- (17) To anchor any motorized or nonmotorized water vehicle of any shape or form in the marine waters of Ahihi-Kinau natural area reserve;
- (18) To enter into any cave, as defined in section 6D-1, Hawaii Revised Statutes, or any portion thereof;
- (19) To conduct any other activity inconsistent with the purpose and intent of the natural area reserves system. [Eff 6/29/81; am 12/9/02; am 7/3/03; am] (Auth: HRS § 195-5) (Imp: HRS § 195-5)

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§ 13-209-4.5 Closing of areas. The board or its authorized representative, with the approval of the commission, may close or restrict the public use of all or any portion of a natural area reserve for up to two years, when deemed necessary by the commission for the protection of the natural, geological, or cultural resources of the area or the safety and welfare of persons or property, by the posting of appropriate signs indicating the duration, extent, and scope of closure. Closures may be renewed with the approval of the board or its authorized representative and the commission. All persons shall observe and abide by the officially posted signs designating closed areas. [Eff] (Auth: HRS § 195-5) (Imp: HRS § 195-5)

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§ 13-209-4.6 Visiting hours. The board or its authorized representative, with the approval of the commission, may establish a reasonable schedule of visiting hours for all or portions of a natural area reserve by the posting of appropriate signs indicating the hours during which the natural area reserve may be accessed. All persons shall observe and abide by the officially posted signs designating visiting hours." [Eff _____] (Auth: HRS § 195-5)
(Imp: HRS § 195-5)

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§ 13-209-5 Special-use permits. (a) The board or its authorized representative, with the approval of the commission or its authorized representative, may issue permits to conduct activities otherwise prohibited by section 13-209-4 for research, education, management, or for any other purpose consistent with chapter 195, Hawaii Revised Statutes.

(b) No permit may be valid for more than one year from date of issuance. The board may waive this restriction for permits issued to other governmental agencies where the board determines such a waiver to be in the best interest of the State.

(c) All special-use permits shall be subject to standard conditions, as approved by the board, including but not limited to the following:

- (1) The permittee shall adhere to specifications given in the permit application;
- (2) Disturbance of vegetation and wildlife shall be avoided as much as possible;
- (3) Precautions shall be taken to prevent introductions of plants or animals not naturally present in the area. The permittee is responsible for making sure that participants' clothes, equipment, and vehicles are free of seeds or dirt to lessen the chance of introducing any non-native plants or soil animals. Should an infestation develop attributable to permittee, the permittee is responsible for eradication by methods specified by the department;
- (4) This permit is not transferable;
- (5) This permit does not exempt the permittee from complying with any other applicable rule or statute;
- (6) The State of Hawaii shall be released and held harmless from any and all liability for injuries or death, or damage or loss of property however occurring during any activity related to this permit.

(d) The board or its authorized representative may attach special conditions on the special-use permit, including but not limited to reporting requirements, limitations on the size of groups or the length of time for which the permit is valid. Failure to comply with any of these conditions shall render a permit void.

(e) All permittees shall carry the permit with them at all times while in the reserve and shall, upon request, show the permit to any law enforcement officer or the board or its authorized representative.

(f) Permits are not transferable. If the permittee is a partnership, joint venture, or corporation, the sale or transfer of 25 percent or more of ownership interest or stocks by dissolution, merger, or any other means, shall be deemed a

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transfer for purposes of this subsection and subject to the right of the department to terminate this permit effective the date of the sale or transfer.

(g) The board or its authorized representative may revoke or cancel a permit without prior notice when an emergency is declared by the department or other proper authority or when the special-use poses an immediate threat to the health, safety, and welfare of the public or natural, geological, or cultural resources of the reserve.

(h) The board or its authorized representative may revoke or cancel any permit with thirty days written notice:

- (1) For any infraction of the terms and conditions of the permit;
- (2) Upon a finding that the special-use threatens to damage the integrity or condition of the natural, geological, or cultural resources in the reserve;
- (3) Upon a finding that the special-use poses a threat to the health, safety, or welfare of the general public or otherwise negatively impacts the general public's use and enjoyment of the reserve; or
- (4) Upon closure of a reserve pursuant to section 13-209-4.5.

(i) The provisions of this section shall not exempt the applicant from complying with any other applicable rule or statute. [Eff 6/29/81; am] (Auth: HRS § 195-5) (Imp: HRS § 195-5)

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§ 13-209-5.5 Applications for special-use permits. (a)

All applications for special-use permits shall be submitted in writing to the board or its authorized representative on the form prescribed by the department. The application shall contain the following information:

- (1) Name of applicant, and if relevant, affiliation and title;
- (2) Contact information, including name of primary contact, mailing address, phone number, and if available, email address;
- (3) The period of time for which the permit is requested, not to exceed one year unless seeking a waiver pursuant to section 13-209-5(b);
- (4) The reserve(s) involved;
- (5) A map illustrating the reserve and the location within the reserve of the proposed special-use;
- (6) A description of the proposed special-use;
- (7) A discussion of how the proposed special-use satisfies subsections (b)(1) through (b)(6);
- (8) An assessment of the potential environmental impact the special-use may have on the reserve or the surrounding area;
- (9) Signature of the applicant;
- (10) An application fee of \$50, however, the board or its authorized representative may waive the application fee if, in their opinion, the waiver is in the public interest or benefits the State; and
- (11) Any other information as determined by the department.

(b) In evaluating the merits of an application for a special-use permit, the board or its authorized representative shall apply the following criteria:

- (1) The proposed special-use cannot be conducted elsewhere;
- (2) The proposed special-use is consistent with the purpose and objectives of the natural area reserve system;
- (3) The proposed special-use is consistent with the management plan developed for the reserve;
- (4) The proposed special-use provides a benefit (direct or indirect) to the natural area reserve system or to the individual reserve(s) or both;
- (5) The proposed special-use will not damage or threaten to damage the integrity or condition of the natural, geological, or cultural resources in the natural area reserve and adjacent area or region;
- (6) The proposed special-use complies with provisions

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and guidelines contained in Chapter 205A, Hawaii Revised Statutes, entitled "Coastal Zone Management", where applicable; and

- (7) The applicant shall have complied with, or be in compliance with, the conditions of any previously approved permit.

(c) The applicant shall have the burden of demonstrating that the proposed special-use is consistent with the criteria in subsection (b).

(d) The board or its authorized representative may hold a public hearing on an application where determined by the chairperson that the scope of the proposed special-use or the public interest requires a public hearing on the application. Notice of the hearing shall be given not less than twenty days prior to the date set for the hearing. Notice of the time and place of the hearing shall be published at least once in a newspaper in the county where the natural area reserve is located.

(e) If within two hundred seventy days after the department's acceptance of a completed application, the board or its authorized representative shall fail to render a decision thereon, the application for a special-use permit shall be automatically approved with the standard conditions outlined in section 13-209-5(c), provided that the board may revoke this approval pursuant to section 13-209-5(g) and (h). The two-hundred-seventy-day time period provided shall not commence until a completed application is accepted by the department. Physical receipt of an application by the department does not constitute acceptance. The two-hundred-seventy-day time period for decision may be extended for another one hundred eighty days at the request of the applicant to give the board additional time to review and make a decision on the application." [Eff] (Auth: HRS §§ 195-5, 91-13.5) (Imp: HRS §§ 195-5, 91-13.5)

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DEPARTMENT OF LAND AND NATURAL RESOURCES

Amendments to Chapter 13-209, Hawaii Administrative Rules, on the Summary page dated (Board adoption date), were adopted on (Board adoption date), following a public hearing held on June 28, 2006, after public notice was given in the Honolulu Star-Bulletin, West Hawaii Today, the Hawaii Tribune-Herald, the Maui News, and the Garden Island, on May 28, 2006.

These amendments shall take effect ten days after filing with the Office of the Lieutenant Governor.

PETER T. YOUNG
Chairperson, Board of Land and
Natural Resources

APPROVED AS TO FORM:

Deputy Attorney General

LINDA LINGLE
Governor
State of Hawaii

Date:

Filed